IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case Nos. CR-18-01421 and CR-19-00382
Indictment Nos. C1711284B and C1711284A

DIRECTOR OF PUBLIC PROSECUTIONS

v

NALAKA WIJERATNE

JUDGE:	HIS HONOUR JUDGE TRAPNELL
WHERE HELD:	Melbourne
DATE OF HEARING:	2 April 2019 and 4 September 2019
DATE OF SENTENCE:	30 September 2019
CASE MAY BE CITED AS:	DPP v Wijeratne
MEDIUM NEUTRAL CITATION:	[2019] VCC 1561

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW
Catchwords:	Sentence – Kidnapping – False Imprisonment – Make threat to kill – Threat with knife to victim's throat – Took victim to bank twice to unfreeze account – Victim released without injury – High moral culpability – Late plea of guilty – Well-educated – Gambling and drug addiction – Obtain funds to repay debt – Citizen of Sri Lanka – Prior criminal history of dishonesty offences – Total effective sentence of 8 years 3 months' imprisonment – 6 years' non-parole period
Legislation Cited:	*Crimes Act 1958* s 63A, s. 20, s. 82(1), s. 63A, s. 320 – *Sentencing Act 1991*, s. 3(1), s. 5(4)
Cases Cited:	*Ulutui V The Queen* (2014) 41 VR 676 – *Smith v The Queen* (2014) 245 A Crim R 331 – *Nguyen v The Queen* (2010) 208 A Crim R 464 – *R v Miller* [1995] 2 VR 348 – *R v Rankin* [2001] VSCA 158 – *Young v The Queen* [2015] VSCA 265 – *Hanna v The Queen* [2014] VSCA 187 – *The Queen v Phuc* [2000] VSC 296 - *R v Lacey* [2006] VSCA 4 – *Magedi v The Queen* [2019] VSCA 102 – *Allouch v The Queen* [2018] VSCA 244 – *Loftus v The Queen* [2019] VSCA 24 – *Underwood (a Pseudonym) v The Queen [No 2]* [2018] VSCA 87 – *Sahhitanandan v The Queen* [2019] VSCA 115 – *DPP v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428 – *Hills v The Queen* [2011] VSCA 364 – *Cini v The Queen* [2013] VSCA 115 – *Elmaghraby v The Queen* [2016] VSCA 326

– *DPP v Hudgson* [2016] VSCA 254 – *Gul v The Queen* [2017] VSCA 153 – *Re Ceylan* [2018] VSC 361

Sentence: Total effective sentence of 8 years 3 months' imprisonment with a non-parole period of 6 years' imprisonment

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APPEARANCES:	Counsel	Solicitors
For the DPP	Mr J J S Jassar	Mr J Cain, Solicitor for Public Prosecutions
For the Accused	Mr C Pearson 2 April & 4 September 2019 Mr Z Petric 30 September 2019	Turnbull Lawyers

HIS HONOUR:

1 Nalaka Wijeratne, you have been found guilty by a jury of one charge of kidnapping (Charge 1 on Indictment C1711284B)[1] ('the trial Indictment'), one charge of false imprisonment (Charge 2 on the trial Indictment),[2] and one charge of make threat to kill (Charge 4 on the trial Indictment).[3] On two charges of common law assault, I upheld a submission of no case to answer and discharged the jury from delivering a verdict on those charges, and directed that an entry of not guilty be made on the court record pursuant to s 241(2)(b) of the *Criminal Procedure Act 2009*. You have also pleaded guilty to one charge of obtaining a financial advantage by deception (Charge 1 on Indictment C1711284A)[4] ('the plea indictment').

2 The maximum penalty for kidnapping is 25 years' imprisonment.[5] The maximum penalty for false imprisonment is 10 years' imprisonment.[6] The maximum penalty for make threat to kill is 10 years' imprisonment,[7] and the maximum penalty for obtaining a financial advantage by deception is 10 years' imprisonment.[8]

The facts

3 For the purposes of sentencing you, insofar as the kidnapping, false imprisonment and make threat to kill charges are concerned, I accept the evidence of your victim, Muditha Ganehiarachchi, who I find was an honest and reliable witness and whose version of events I find must have been accepted by the jury. In sentencing you on the charge of obtaining financial advantage by deception, I accept the Further Amended Summary of

[1]Contrary to *Crimes Act 1958* s 63A.
[2]Contrary to common law.
[3]Contrary to *Crimes Act 1958* s 20.
[4]Contrary to *Crimes Act 1958* s 82(1).
[5]Pursuant to *Crimes Act 1958* s 63A.
[6]Pursuant to *Crimes Act 1958* s 320.
[7]Pursuant to *Crimes Act 1958* s 20.
[8]Pursuant to *Crimes Act 1958* s 82(1).

Prosecution Opening, dated 4 September 2018, to the extent that it is based on the version of events given by Mr Ganehiarachchi, whose evidence I accept as to these sentencing facts.

4 In order to maintain a chronological dissertation of the facts, I will deal with the charge of obtaining financial advantage by deception first.

5 Ganehiarachchi, who was aged 23 at the time of the offences, arrived in Australia from his birth place, Sri Lanka, on 23 February 2016.

6 On or about 3 March 2017, he attended a friend's party in Dandenong, where he met you. This set in train the events that led to the offending, the subject of these proceedings. In summary, the prosecution case, which I accept, is that at this first meeting, you represented to Ganehiarachchi that you were a financial adviser, who could procure a car loan for him. At this time, you owed approximately $20,000 to your co-accused, Suncica Brajic-Bejdic. I am not aware of the reason for your indebtedness to Brajic-Bejdic and this is not relevant in these proceedings.

7 I accept that you seized an opportunity to defraud Ganehiarachchi by means of having him obtain a loan from the Commonwealth Bank of Australia ('CBA') for the purchase of a motor vehicle, with the intent that you would take most of the proceeds of that loan from him and use the money to repay your indebtedness to one Brajic-Bejdic. Your intended victim was a young naïve man who had just arrived in this country and he was vulnerable to your scheme to defraud him.

8 The loan was to be for $26,000 for Ganehiarachchi to purchase a Toyota Camry which he had seen on the internet. You told Ganehiarachchi that you could obtain a loan for him and you would charge him a 10 per cent broker's fee. You told him that you worked for CBA and you could get the loan approved very quickly.

9 At your request, Ganehiarachchi provided you with his bank account details, including his log-in details and password, personal details and a copy of his payslips, gas bill and Australian visa.

10 As part of the Crown case there was an allegation that the documentation provided to the bank was fraudulent. I make no finding regarding this or, if it was fraudulent, who prepared and submitted that documentation. It is not relevant to my sentencing you for the present offence.

11 You set-up an online banking application attached to Ganehiarachchi's account and established verification processes with the bank so you could effectively take control of his account. You changed the mobile phone listed on the account from Ganehiarachchi's mobile number to yours. You also performed $1.00 test transactions to confirm you had control of the account and could transfer funds into an account in the name of Mario Bejdic, the husband of your co-offender Brajic-Bejdic, without raising suspicion. You also increased the daily funds transfer limit on the account from $2,000 per day to $20,000 per day.

12 On 31 March you told Ganehiarachchi that the loan had been approved. On 3 April 2017, Ganehiarachchi logged into this CBA account and saw that the loan amount of $26,000 had been deposited. However, a short time later, he also saw, that an amount of $19,960 had been withdrawn and transferred out of his account. Ganehiarachchi immediately became concerned and transferred the remaining $6,000 into another account in his name.

13 It was later established that these funds had been transferred into an CBA account in the name of Mario Bejdic. This account had been opened on 8 March 2017 and on the same day Brajic-Bejdic was given authority to operate the account.

14 Ganehiarachchi called you in order to retrieve the money. You admitted that you had moved the money and that you needed some money and would

repay him in a week's time. You sent Ganehiarachchi a picture of yourself with your South Australian drivers' licence in an effort to reassure him. Unsurprisingly, Ganehiarachchi did not trust you.

15 The charge on the plea indictment alleges that on 3 April 2017 you dishonestly obtained a financial advantage for yourself or another, namely the transfer of $19,960 from the CBA bank account of Muditha Ganehiarachchi to a CBA bank account in the name of Mario Bejdic by deception, namely by falsely representing that you were authorised by Muditha Ganehiarachchi to conduct this transfer of funds.

16 Accordingly, it is the transfer of the $19,960 from the loan funds provided by the CBA to Ganehiarachchi into the account of Bejdic without the authorisation of Ganehiarachchi, which is the deception relied upon by the Crown, and not any deception that may have been perpetrated on CBA in relation to obtaining the loan.

17 The nub of the charge of obtaining financial advantage by deception is that you deceived Ganehiarachchi into thinking this was a legitimate loan opportunity and the money would be paid to him by the CBA and that you needed his log in, and other details, for this purpose. Your actual purpose was to use the complainant's information to obtain most of the loan moneys from the CBA and use these funds to repay your indebtedness to Brajic-Bejdic. These facts give rise to the charge of obtaining financial advantage by deception (Charge 1 on the plea Indictment).

18 The circumstances giving rise to the charges of kidnapping, false imprisonment and make threat to kill occurred against this background of the unlawful transfer of the proceeds of Ganehiarachchi's loan from his account and into the bank account in the name of Mario Bejdic.

19 On 3 April 2017, when Ganehiarachchi became aware of the unauthorised transfer of his funds, he contacted the bank, with the result that both his and

Bejdic's accounts were frozen. When Brajic-Bejdic became aware that the account was frozen and the funds could not be accessed by her, this set in train a series of events which gives rise to the charges of kidnapping, false imprisonment and make threat to kill. For the purposes of sentencing you I entirely accept Ganehiarachchi's version of events.

20 Between 6 April 2017 and 17 April 2017, you and Brajic-Bejdic made a number of efforts to get Ganehiarachchi to unfreeze the account so the sum of $19,960 could be withdrawn by Brajic-Bejdic. Ganehiarachchi refused to cooperate. In consequence, you together with Brajic-Bejdic, planned and executed the kidnapping of Ganehiarachchi so as to force him to unfreeze the account so Brajic-Bejdic could access the funds.

21 On 17 April 2017, at about 7.30pm, you called Ganehiarachchi and told him you were outside his house and asked him to come outside. Ganehiarachchi complied and, as he approached you standing near your motor vehicle, your co-offenders David Roe and Brajic-Bejdic suddenly appeared. You produced a 20 centimetre long steak knife from your right hand jacket pocket, pressed it against the front of Ganehiarachchi's throat and 'threatened [him] to get into the car'. Roe pushed Ganehiarachchi and told him to 'Get into the car'.

22 Roe pushed Ganehiarachchi into the rear seat of the vehicle, got in beside him and covered his head with the jacket Ganehiarachchi was wearing thereby covering his eyes. Roe took Ganehiarachchi's wallet and mobile phone and handed them to you. You are not charged with any offences relating to the removal of these items, this is simply put as being part of the facts surrounding the kidnapping. Ganehiarachchi was required to keep his head bent down on his knees during the car trip.

23 You got into the driver's seat and Brajic-Bejdic got into the front passenger seat and you drove off. Once in the car, you told Ganehiarachchi to 'activate the account'. Brajic-Bejdic told Ganehiarachchi he was to stay the night at her

house and tomorrow morning he had to go to the bank and 'activate' the account. The trip to Brajic-Bejdic's house lasted about 30 to 45 minutes. These facts give rise to Charge 1 – kidnapping.[9]

24 The prosecution case in respect of Charge 1 is that you and your two co-accused took away Ganehiarachchi from his home by force and detained him for the purpose of you and Brajic-Bejdic obtaining access to the $19,960 which had been fraudulently transferred by you into Bejdic's bank account.

25 The car driven by you travelled to Brajic-Bejdic's house at 2B Andrew Road, St Albans, where she lived with her husband and her mother, Anna Bejdic. You and Roe were also staying in that house at the time.

26 With his face still covered, Ganehiarachchi was taken by force into a bedroom of the house where his wrists and ankles were tied to a chair with a white electrical extension cord. Another power cord was tied around Ganehiarachchi's neck and secured to the cord around his wrists. Understandably, he was unable to move. Once he was trussed up in this fashion, his jacket was finally removed from his head, at which point you and Roe were in the room. These facts give rise to the commencement of the false imprisonment charge (Charge 2), which is a continuing offence.

27 After about ten minutes, Brajic-Bejdic entered the room wearing a 'scary-looking' red mask and hit Ganehiarachchi once with a metal vacuum cleaner pole on the left arm towards his shoulder, which caused him pain. He was told to go to the bank and get the money. Roe was holding him whilst he was stuck.

28 According to Ganehiarachchi's evidence at trial, you left the room prior to this offence being committed and, accordingly, at the close of the prosecution case

[9]As to kidnapping being a continuing offence see Ulutui V The Queen (2014) 41 VR 676, 696–697 [86]–[92] (Redlich JA, Neave and Tate JJA agreeing).

you were discharged by direction and a verdict of not guilty was entered on the court record.

29 Brajic-Bejdic left the room and you re-entered the room with the knife in your hand, held it to Ganehiarachchi's throat and demanded Ganehiarachchi activate Bejdic's account. With the knife pressed to his throat you said: 'Do not try to do anything, I will kill you'. Ganehiarachchi took this to mean that he must not try to escape. You were in possession of Ganehiarachchi's wallet and knew where he lived. You said words to the effect that if he tried to escape you would come and find him and you would kill him. Ganehiarachchi told you he would give you the money. All of this time Ganehiarachchi was 'so frightened'. These facts give rise to Charge 4 on the trial indictment.

30 Roe had left the room by this stage. Following this incident, Ganehiarachchi was left alone in the room which was dimly lit. The door was left partially open.

31 Some time later, when Roe had returned to the room, Ganehiarachchi tried to wriggle free, but Roe saw this and informed Brajic-Bejdic. She returned to the room wearing the same 'scary' red mask and asked Ganehiarachchi whether he was trying to escape. When he said 'No', she hit him three or four times on the left leg below the knee with the vacuum cleaner pole. While this was occurring Roe was holding him tightly by the shoulder.

32 Eventually Ganehiarachchi fell asleep. At that time Roe was in the room sleeping on the floor, in effect securing Ganehiarachchi so that he could not escape. According to Ganehiarachchi, he was given no food or water, he was not taken to the bathroom or toilet and he was in pain and very scared.

33 The next day, when you approached Ganehiarachchi, he agreed to go to a bank branch and unfreeze Bejdic's bank account. For this purpose the three of you took him to the Watergardens Shopping Centre branch of the CBA. During the car trip his head was again covered with his jacket so he could not see. Ganehiarachchi said he was frightened.

34 You and Ganehiarachchi entered the bank and made arrangements with a customer service officer to have the Ganehiarachchi and Bejdic accounts unfrozen and a form was completed and signed by Ganehiarachchi for that purpose. He was told it would take 24 hours to unfreeze the accounts. Ganehiarachchi and the three of you then returned to the car and went back to the Andrew Road address.

35 Ganehiarachchi was given a glass of water and a biscuit and you told him that he was to remain at the house for a further 24 hours to ensure that the accounts were unfrozen. Ganehiarachchi was kept in the living room for about half an hour and was then returned to the bedroom where he had previously been imprisoned. He was tied up again in similar fashion but without the neck tie. He was kept alone in the room all day on 18 April.

36 The next morning, 19 April 2017, you telephoned the bank to check whether the money was available and you were told by a bank employee that more was needed to be done to release the funds and Ganehiarachchi would have to attend the bank branch for that purpose.

37 All three of you again took Ganehiarachchi to the shopping centre where you and Ganehiarachchi again entered the bank. A customer service officer put Ganehiarachchi on the phone to a person at the Commonwealth Bank's Security Department. Ganehiarachchi was asked by a CBA security officer if he wanted to cancel the investigation and free the funds, to which Ganehiarachchi said 'Yes'. The CBA security officer said that the account would be unlocked and that the funds would be available for withdrawal in about 15 minutes' time.

38 After about 15 minutes, Brajic-Bejdic went to an ATM at the shopping centre and withdrew some money. You then drove Ganehiarachchi and your co-offenders to a number of ATMs where Brajic-Bejdic withdrew almost the entire amount of $19,960 from the account.

39 Following these events, you and your co-offenders drove Ganehiarachchi back to the Andrew Road address where he went into the living room for a short time. He then got into a different vehicle and you drove him to the South Yarra railway station, where he was finally released at about 5.00pm. You returned Ganehiarachchi's wallet and phone to him at this time and he then went home.

40 The false imprisonment charge is a continuing offence committed over a period of some 45½ hours between about 7.30pm on 17 April 2017 and about 5.00pm on 19 April 2017. This covers the period from when Ganehiarachchi was first forced into the room at 2B Andrew Road, St Albans until he was eventually released by you at the South Yarra railway station.

41 After receiving advice from some friends and a relative, Ganehiarachchi reported these offences to police on or about 12 May 2017.

42 You were arrested by police at the Andrew Road premises on 31 May 2017. During your record of interview you admitted arranging the loan for Ganehiarachchi and driving him to the bank twice at the relevant times. You also admitted to Ganehiarachchi being at the premises in Andrew Road, but you denied that he was kept there against his will or in any way imprisoned in the house, and you denied the kidnapping.

Offence seriousness

43 Kidnapping is a very serious criminal offence as indicated by the maximum penalty of 25 years' imprisonment, which is the highest fixed maximum sentence in the criminal calendar.[10] The maximum penalty 'shows unambiguously how seriously the community, through the Parliament, views this conduct'.[11]

[10] See *Smith v The Queen* (2014) 245 A Crim R 331, 346 [84], 350 [109] (Whelan JA, Neave JA agreeing).
[11] *Nguyen v The Queen* (2010) 208 A Crim R 464, 468 [18] (Maxwell P and Buchanan JA agreeing).

44 Moreover, in my opinion, this is a serious example of kidnapping. Ganehiarachchi was lured from his home, where he had the right to feel safe, and he was bundled into a motor vehicle while you held a knife to his throat. He was secured in the back seat of that motor vehicle by Roe, who pulled his coat over his head, thereby depriving him of his vision.

45 I accept the Crown's characterisation of the present instance of kidnapping:

> 46 [It] is of the more serious kind, with a planned abduction of the victim from his home by the offender in the company of two others with the motive of intimidation in order to extract money that was rightfully the victim's.[12]

47 The circumstances of the abduction were intimidating, with you producing a knife and with Ganehiarachchi being forced and pushed into the back-seat of the car by Roe, who then covered his head with a jacket and removed his mobile phone and wallet from his pocket and gave them to you. You drove Ganehiarachchi to the Andrew Road address where you continued to participate in the abduction in these intimidating circumstances.

48 I am satisfied, beyond reasonable doubt, that you and Brajic-Bejdic were the instigators of this kidnapping, and called upon Roe to assist you. You planned and executed the offence in order to unfreeze the funds so that you could pay your debt to Brajic-Bejdic.

49 I have had regard to the matters contained in the outline of submissions on plea filed by your counsel, dated 2 April 2019.[13] I accept that Ganehiarachchi was not physically injured during the kidnapping, nor are you legally liable for any injuries that he incurred during the period of the false imprisonment.

50 Nonetheless, this must have been a truly terrifying ordeal for Ganehiarachchi. I note that no victim impact statement has been tendered in this matter.

[12] See DPP's 'Further Plea and Sentencing Submissions' dated 13 May 2019 [28].
[13] Exhibit W1

Nonetheless, where no victim impact statement has been tendered, a sentencer may draw reasonable inferences from the evidence regarding the likely impact of an offence upon the victim.[14]

51 The false imprisonment, lasting as it did some 45½ hours, is also a serious example of that offence. For much of that time Ganehiarachchi was tied to a chair and deprived of food and water. The duration of the false imprisonment and the conditions Ganehiarachchi was kept under places this conduct at the serious end for offending of this kind.

52 Ganehiarachchi was abducted on the evening of the 17 April and then detained in a room, his ankles, legs and neck tied to a chair by electrical extension cord overnight and he was not given food or water. He was then conveyed in the company of you and your co-offenders in a car to the bank the next day and returned to the same room and tied up again, for another night. He was then taken on a second trip to the bank on 19 April by all three of you. Ganehiarachchi was therefore detained for an extended period of two nights and three days. He was physically restrained and deprived of his liberty and intimidated. Ganehiarachchi was physically assaulted and you were a willing participant in this prolonged, intimidating and objectively terrifying ordeal involving his physical restraint and the deprivation of his liberty.

53 In *Young v The Queen* the Victorian Court of Appeal opined:[15]

> 54 As Priest JA[16] pointed out in *Hanna v The Queen*,[17] kidnapping, which often culminates in an ensuing period of false imprisonment, often attracts sentences of imprisonment in 'double figures'. Indeed, 'sentences of imprisonment exceeding seven years, to a shade under 10 years, are not uncommon generally for kidnapping and associated offending.[18]

[14] *R v Miller* [1995] 2 VR 348, 354 (Southwell, Ormiston and McDonald JJ); *R v Rankin* [2001] VSCA 158 [9]–[10] (Winneke P, Vincent JA and O'Bryan AJA agreeing).
[15] [2015] VSCA 265 [79] (Osborn, Beach and McLeish JJA).
[16] With whom Maxwell P and Neave JA agreed.
[17] [2014] VSCA 187.
[18] Ibid [88]. See also *The Queen v Phuc* [2000] VSC 296 [17] (Vincent J).

55 Making a threat to kill is a serious criminal offence, as indicated by the maximum penalty of 10 years' imprisonment. This is a serious example of that offence, being reinforced by you placing a knife to the Ganehiarachchi's throat at the time of making the threat. I do not accept that the seriousness of this offence can be minimised in the manner your counsel sought to do at the plea hearing.

56 I am also very mindful of the need to not impose double punishment on you as a consequence of the overlapping nature of the offences. As Vincent JA opined in *R v Lacey*:

> 57 It is, of course, well recognised that although it is sometimes extremely difficult to separate the bases of punishment in situations where a number of offences are committed within the ambit of a single incident or enterprise, the sentencing judge must endeavour to do so and address the issue of possible overlapping by moderating the individual sentences and the making of orders for concurrency.[19]

58 Overall, I consider this to be very grave offending and your moral culpability is high. Clearly, denunciation, general deterrence and just punishment must be given significant weight in sentencing you for these serious offences.

Personal circumstances

59 You are presently aged 44 years and were 42 at the time of committing these offences. You were born in Colombo in Sri Lanka. You are well-educated and were raised in an entirely functional, middleclass family environment. You completed your secondary schooling in Colombo.

60 Your mother is alive and living in Colombo. However, your father died in 2016. You have an elder brother who lives in Australia and a younger brother who lives in Sri Lanka. Your elder brother was present in court during some of the trial supporting you.

[19][2006] VSCA 4 [24] (Vincent JA, Callaway and Chernov JJA agreeing).

61 In 1994, when you were 19 years old, you and your brother came to Australia on student visas. You were intending to study information technology and then business management. However, whilst working at Coles during this period, you stole money from the till and were you charged with theft. Nine charges of theft were dealt with on 26 October 1995 at the Prahran Magistrates' Court where you were, without conviction, released on a community based order for six months to perform 65 hours of unpaid community work.

62 Unfortunately, you developed a gambling addiction, and this has been a source of problems for you over many years. Your gambling issues became so problematic and entrenched that, in 2000, you decided to leave Australia. After living in Singapore for two years, you returned to live in Sri Lanka from 2002 until 2012. You established a successful garment manufacturing business there.

63 In 2012, you returned to Australia and lived in Adelaide. You married and operated a successful used car sales business which traded until 2016.

64 During this period you lived an entirely responsible life. You were hardworking and contributed to an increasing list of charitable organisations, including the Red Cross, Amnesty International, The Stroke Foundation and Child Fund Australia. You sponsored two children living in Africa. This shows that you, at that time, had a social conscience.

65 In 2016, your wife left you and, as your counsel described, your world 'gradually fell apart'. I note that you have no children.

66 You recommenced gambling and, as a result, you lost your car sales business. A property that you owned in Sri Lanka, which was apparently valued at $1 million, was sold and the proceeds were also lost in gambling. Your losses mounted up and you were excluded from casinos in Adelaide and Melbourne. Your counsel told me that in one year you lost about $2 million.

67 You then started using drugs, mostly methylamphetamine, and over the ensuing 18 months, as your counsel described, you frittered away a fortune.

68 You ultimately returned to Melbourne to live and met Bejdic. You worked as an unregistered loan broker.

69 Your counsel described your offending as occurring against a background of financial malaise and personal crisis, including drug use.

70 Since your arrest on 31 May 2017, you have been held in custody – initially in gaol and then in immigration detention. You will return to Sri Lanka upon the completion of your sentence. Later in these reasons, I will deal with the significance of this factor.

71 You have a concerning prior criminal history. Apart from the theft charges dealt with in October 1995, you were dealt with for further theft matters in October 1996, when you were convicted and fined $1,000. In March 1997, you were convicted of two charges of obtaining property by deception and three charges of being an excluded person remaining in a casino, and you were convicted and released on a community based order to perform 100 hours of unpaid community work over six months and to receive counselling in respect of your gambling practice.

72 In July 1997, you were again dealt with for attempting to obtain property by deception and convicted and fined $150. You have other prior convictions for wilfully damage property, possessing counterfeit money, and a large number of traffic offences.

73 There is a gap in your prior criminal history between July 2000 and July 2016, which is explained by your absence from Australia. From 2016, you have further driving offences, breaches of the *Bail Act 1977*, and a charge of possessing equipment to use with a controlled drug. You have received a

number of fines with conviction and community based orders in the past, but this is your first sentence of imprisonment.

74 I was told by your counsel and accept that you have no subsequent offences and no matters outstanding or pending.

75 I accept that you have no history of violent offending. However, your reasonably extensive history of committing dishonesty offences is, of course, highly relevant to sentencing you for the obtaining a financial advantage by deception charge.

76 You admit that your motive for committing the crime of obtaining financial advantage by deception was to obtain funds to repay a debt of $19,960 that you owed to Brajic-Bejdic.

Mitigating circumstances

77 I accept that you are entitled to a discount on your sentence on account of your plea of guilty to the charge of obtaining a financial advantage by deception, albeit your plea was entered late in the proceedings. You will obtain the utilitarian benefit of that plea. I also accept that it demonstrates an acceptance of responsibility by you and a willingness to facilitate the administration of justice. However, I am unable to find that your plea is evidence of true contrition and remorse over and above what is evident from the plea itself.

78 I also accept that there has been some delay in this case, which is through no fault of yours, and that you have had this matter hanging over your head for some time, and I take that into account in your favour.

79 I accept that in the past you have led a productive life. That you are well-educated and have had gainful employment over many years. That you have contributed to society by making donations to various charities. However, it

appears that your gambling and drug use has led you into antisocial behaviour and ultimately into the commission of these very serious offences.

80 While your prior convictions are concerning, they are not as bad as those of many others who commit similar offences.

81 So far as your visa status is concerned, a lot of time and effort was spent during the plea and the subsequent hearing in relation to this matter. You are not an Australian citizen and your visa to remain in Australia has expired. However, at the time of committing these offences you had a valid and lawful visa to remain in Australia.

82 I am satisfied that you will be deported to Sri Lanka upon your release from custody and that this is a mitigating factor in your case. The authorities make it clear that this can have relevance in two ways. Firstly, it may mean you will serve your sentence more onerously by knowing that at the end of it you will be deported to Sri Lanka. However, in your case, your marriage has effectively ended and your family are living in Sri Lanka. You want to return there to be re-united with them at the end of serving your sentence. In fact, you have completed and submitted a Request for Removal from Australia with Australian Border Force. Accordingly, this is not a mitigating circumstance in your case.[20] I note your counsel did not rely on this aspect of deportation during the plea hearing.

83 The second way the risk of deportation can be relevant is that you have, by reason of committing these offences, lost the opportunity you had to settle in Australia and make a life for yourself here. I accept in your case this has led to a 'sense of real loss of the prospect of settling' here. The authorities accept this is a form of extra-curial punishment, which I take into account in your favour in sentencing you for this offending.[21]

[20] *Magedi v The Queen* [2019] VSCA 102 [47] (Maxwell P and Weinberg JA) ('*Magedi*').
[21] *Magedi* [47], [55]–60]; *Nguyen v The Queen* [2016] VSCA 198 [35]; *Allouch v The Queen* [2018] VSCA 244 [39] (Beach and Weinberg JJA); *Loftus v The Queen* [2019] VSCA 24 [65], [79] (Whelan and Niall JJA).

84 I note that you have spent 466 days in immigration detention. This time cannot be declared as pre-sentence detention under s 18 of the *Sentencing Act 1991*. Nonetheless, I will take it into account in your favour in a broad and practical way in structuring the sentences I impose on you.[22]

85 Moreover, there have suffered a degree of 'custodial hardship' whilst you have been in immigration detention and I take this factor into account in your favour.

86 Application of sentencing principles

87 I have had regard to current sentencing practice in relation to the offences of kidnapping, false imprisonment and make threat to kill in light of the decision of the High Court of Australia in *DPP v Dalgliesh (a Pseudonym)*.[23] It is difficult to gauge more than a very general yardstick from so-called 'comparable cases', given the wide range of offending conduct which can constitute these offences and the myriad of personal circumstances pertaining to individual offenders.[24] Nonetheless, to the extent that I have been able to gain any assistance from comparable cases, I have sought to do so in your case.[25]

88 So far as parity is concerned, I have had regard to the sentences imposed on your co-offender, Suncica Brajic-Bejdic, by his Honour Judge Meredith on 29 November 2018.[26] On the charge of kidnapping, she received a sentence of three years' imprisonment. On the charge of false imprisonment, she received a sentence of two years' imprisonment, and on a charge of knowingly deal with proceeds of crime, she received a sentence of nine months' imprisonment. With orders for cumulation she received a total effective sentence of four years' imprisonment and a non-parole period of two years

[22]See *Underwood (a Pseudonym) v The Queen [No 2]* [2018] VSCA 87; *Sahhitanandan v The Queen* [2019] VSCA 115 [29]–[36], [40]–[41].
[23]*DPP v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428.
[24]So far as kidnapping is concerned see eg *Smith v The Queen* (2014) 245 A Crim R 331, 346–347 [86] (Whelan JA, Neave JA agreeing).
[25]I have been assisted in particular by *Hills v The Queen* [2011] VSCA 364; *Cini v The Queen* [2013] VSCA 115; *Hanna v The Queen* [2014] VSCA 187; *Smith v The Queen* (2014) 245 A Crim R 331, 350 [112] (Whelan Ja, Neave JA agreeing; *Young v The Queen* [2015] VSCA 265 and *Elmaghraby v The Queen* [2016] VSCA 326.
[26][2018] VCC 2021.

was fixed. His Honour's section 6AAA declaration was five years and three months' imprisonment, with a non-parole period of three years.

89 Her situation is entirely different from yours. She was aged 21 at the time of the offending and she was aged 23 at the time of sentence. She had no prior convictions or findings of guilt and no subsequent or outstanding matters. She therefore fell to be sentenced as a youthful first offender.

90 She also pleaded guilty, albeit at a relatively late stage in the proceedings. Nonetheless, his Honour gave her a significant discount for the utilitarian benefit of the plea and he found there was some degree of remorse evident in her case.

91 Importantly, she was sentenced on the basis that she was not aware that you had a knife or that you intended to use it on Ganehiarachchi. His Honour also noted that she was not a party to the use of a weapon or, somewhat surprisingly, assaulting Ganehiarachchi. Of course, this is not the case in this hearing, where it is alleged that she assaulted Ganehiarachchi on two separate occasions, but she was sentenced on a basis which is different from the basis on which you fall to be sentenced.

92 His Honour also accepted that she played a lesser role in the kidnapping and false imprisonment to the roles played by you and Roe. Apparently, her pleas were based on her complicity with you and Roe, rather than on her liability as a principal in respect of the offences. The form of complicity accepted by the Crown was assisting the two of you to commit your offences. On her plea, the prosecution accepted that she had a lesser role in the offending as she was acting at your direction in carrying out the plan to kidnap and falsely imprison Ganehiarachchi.

93 She was also sentenced on the basis that she was vulnerable at the time of her offending and she was socially isolated. Her husband was in custody in the Northern Territory and she had no family in Australia. His Honour also took

into account the fact that her visa to remain in this country had been cancelled and that both bases of mitigation, in accordance with the principles in relation to the effect of deportation in sentencing, applied to her.

94 His Honour took the view that she had 'positive' prospects of rehabilitation and noted the general primacy of youth as a sentencing consideration and the need to foster Brajic-Bejdic's rehabilitation as a young offender. His Honour held that her 'comparative youth and lack of criminal history is a highly relevant sentencing consideration'.

95 Whilst there are a number of significant distinguishing features from your situation, notably Brajic-Bejdic's youthfulness, lack of prior criminal history, vulnerability, lesser role and plea of guilty, I must be careful not to impose unfairly disparate sentences on you. Accordingly, to the extent that Brajic-Bejdic's sentences are of assistance to me, I have had regard to them.

96 The basic purposes for which a court may impose a sentence are just punishment, deterrence, both specific and general, rehabilitation, denunciation and protection of the community. In sentencing you, I must have regard to a range of factors, such as the seriousness of these offences, your culpability for them and your personal circumstances.

97 I am required to balance the interests of the community in denouncing criminal conduct with the interests of the community in seeking to ensure that, so far as is possible, you are rehabilitated and reintegrated into society, albeit not Australian society.

98 General deterrence is a very important sentencing consideration particularly for kidnapping, false imprisonment and make threat to kill. Whilst just punishment, general deterrence and denunciation must be given primary consideration in my instinctive synthesis, I am of the view that, in your case, specific deterrence and protection of the community need be given some real

weight. Moreover, I can only adopt a guarded approach to your prospects of rehabilitation given your gambling history and your history of illicit drug abuse.

99 The totality principle is also relevant given the number of offences for which you fall to be sentenced and their overlapping nature.

100 Kidnapping is a Category 2 offence for the purposes of s 5(2H) of the *Sentencing Act 1991*.[27] Accordingly, on Charge 1 on the trial indictment, I must impose a sentence of imprisonment to be immediately served unless I find there are 'substantial and compelling circumstances' that justify not making an order under Division 2 of Part 3 of that Act (that is not a combined sentence of imprisonment with a community correction order). I cannot find such circumstances exist in your case.[28]

101 In any event, sentences of imprisonment to be immediately served are the only sentences for all the offences before me that I consider would appropriately achieve the purposes for which these sentences are imposed.[29] Your counsel accepted sentences of imprisonment to be immediately served are the only sentences open to me in your case.

102 Moreover, I am of the view that no departure from a 'usual' non-parole period is justified in your case.

103 Stand up Mr Wijeratne:

104 On Indictment no. C1711284B you are sentenced as follows:

105 On the charge of kidnapping (Charge 1) you are convicted and sentenced to imprisonment for 5 years and 9 months.

106 On the charge of false imprisonment (Charge 2) you are convicted and sentenced to imprisonment for 3 years.

[27]See *Sentencing Act 1991*, s. 3(1) definition of category 2 offence paragraph (d).
[28]See *DPP v Hudgson* [2016] VSCA 254 [112]; *Gul v The Queen* [2017] VSCA 153; *Re Ceylan* [2018] VSC 361 [43]–[46] (Beach JA).
[29]See *Sentencing Act 1991*, s. 5(4).

107 On the charge of make threat to kill (Charge 4) you are convicted and sentenced to imprisonment for 2 years.

108 I order that 1 year of the sentence imposed on Charge 2, and 1 year of the sentence imposed on Charge 4 be served cumulatively with the sentence imposed on Charge 1 and on each other, making a total effective sentence on that indictment of 7 years and 9 months' imprisonment.

109 On Indictment no. C1711284A you are sentenced as follows:

110 On the charge of obtaining a financial advantage by deception (Charge 1) you are convicted and sentenced to imprisonment for 1 year.

111 I order that 6 months of that sentence is to be served cumulatively with the total effective sentence imposed on Indictment no. C1711284B, making an overall total effective sentence of 8 years and 3 months' imprisonment.

112 I order that you serve a minimum of 6 years' imprisonment before becoming eligible for parole.

113 I declare 387 days (not including this day) as the period of pre-sentence detention to be reckoned as already served under this sentence and I direct that the fact that declaration was made and its details be noted in the records of the court.

114 Pursuant to s 6AAA of the *Sentencing Act 1991* I state that the sentence I would have imposed on you but for your plea of guilty to Charge 1 on Indictment no. C1711284A is imprisonment for 18 months.

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